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NO.

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1980

FRANK GRACE, ET AL,
Petitioners

V.

FRED BUTTERWORTH, ETC., ET AL,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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QUESTIONS PRESENTED

Factual Basis Common To Questions

After these habeas corpus petitioners' Massachusetts murder convictions were affirmed, the Massachusetts Supreme Judicial Court granted a new trial in another case in which the same trial judge in an almost identical charge to the jury defined proof beyond a reasonable doubt solely in terms of examples of "important" decisions in their "personal lives" and informed the jury of the sentencing and parole consequences of verdicts of first and second degree murder, but petitioners' convictions were then reaffirmed by the state court by constructing supposed distinctions, and on appeal of the dismissal of their habeas corpus petition the First Circuit held the state court had not been "less than even-handed" because it could be making the ruling in the other case prospective only and, alternatively, the charge was not constitutionally defective anyway. About a month later, the state court again held the same trial judge's same charge to be erroneous in yet a third case, however, this time it specified

the same charge was "constitutionally inadequate" and that "retroactive application" of that holding was mandated. A petition for rehearing was allowed by the First Circuit, and upon rehearing, that court recognized that its basis for denying habeas corpus had now been eliminated by the state court, but rather than determine if it were "arbitrary and capricious" for the state court to deny only these petitioners a new trial after a conviction under the same unconstitutional charge, the lower court, in an unprecedented procedure, resubmitted the case to the state court (specifically "retain[ing] jurisdiction", however) for it to attempt "in the first instance" to reconcile its refusal of relief to petitioners with its other decisions. The state court, characterizing that unique referral a "rehearing", then reaffirmed the convictions by constructing a new distinction, and then in a three paragraph Per Curiam opinion the First Circuit held the state court's "explanation" removed any Fourteenth Amendment error.

1. Was petitioners' jury instruction, defining "beyond a reasonable doubt" in terms of specific examples of decisions in the jurors' "private lives" and informing the jury of the sentencing and parole consequences of the available verdicts, "constitutionally inadequate", as the highest state court and other Federal courts substantively so held, and the conflicting opinion of the court below erroneous?

2. Was the Massachusetts Supreme Judicial Court itself "less than even-handed" by constructing specious distinctions to try and reconcile its other precedents with its refusal to grant petitioners a new trial and due process therefore denied?[1]

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[1] Parties to the proceeding below: the petitioner-appellants were Frank Grace and his brother, Ross Grace, and the respondent-appellees were Fred Butterworth and Michael Fair, who were the respective Superintendents of the Massachusetts correctional institutions in which they were serving life terms when their petition for habeas corpus was filed, both of whom were represented in the court below by the Attorney General for the Commonwealth of Massachusetts.

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OPINIONS BELOW

All the opinions of the United States Court of Appeals for the First Circuit--the original opinion, the opinion "On Petition For Rehearing", and the "Opinion After Submission of Case to State Court" (sic)--appear at 635 F.2d 1 (1980), and are also set out in the "separately presented" Appendix hereto (hereinafter cited as "App. ___"), on pages 1-21. [2]

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[2] The Massachusetts Supreme Judicial Court opinions also relevant hereto (opinions on petitioners and two others) are cited in those opinions of the court below, but they are also set out in toto or, where noted, in relevant part in the "separately presented" Appendix hereto, on pages 37-57; 63-86 and the ones relevant to petitioners are officially reported at 376 Mass. ___, 381 N.E. 2d 139 (1978), and ____Mass. ____, 412, N.E. 2d 354 (1980).

JURISDICTION

The judgment on the Petition For Rehearing here sought to be reviewed was entered on December 31, 1980, and one issue, which is the subject of the first question presented, supra, is from the original opinion of the lower court of February 5, 1980, the appeal time on which being tolled by the allowance of the petition for rehearing. The jurisdiction of this Court is invoked under 28 U.S.C. §§1254(1) and 2101(c), since petitioners seek review of a decisicn of a court of appeals on a civil matter praying the issuance of a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Section 1., Fourteenth Amendment, Constitution of the United States of America (in relevant part): "...[N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

The basis for federal habeas corpus jurisdiction in the court of first instance was 28 U.S.C. §2254.

Since "the facts material to the consideration of the questions presented" herein pertain only to events of legal significance occurring after petitioners' murder convictions were initially affirmed "on the merits" by the Massachusetts Supreme Judicial Court and the dismissal of their first petition for habeas corpus affirmed by the court below here , matters relating to events of the murder and the trial testimony need not be alluded to herein.[3] Thereafter, on July 22, 1977, the Massachusetts Supreme Judicial Court handed down its opinion in Commonwealth v. Ferreira, 373 Mass. 116, 364 N.E. 2d 1264 (1977) (set out in relevant parts at App. 63-77), in which it reversed a murder conviction from years previous and

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[3]All those previous official opinions are cited in the opinion here appealed from, 635 F.2d at 3, App. 1-36 should the Court wish to apprise itself or those facts.

ordered a new trial, holding that the same judge who had presided at petitioners' trial had erroneously defined proof beyond a reasonable doubt and had informed the jury of the sentencing and parole consequences of first and second degree murder verdicts. A review of the jury instructions at petitioners' trial disclosed that on those same two issues the same trial judge had, almost word for word, given the very same instructions now held to be reversible error in the Ferreira case,[4] so a motion for a new trial was filed, alleging that a new trial for petitioners was now mandated by Ferreira. The motion was

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[4]There is no question or argument about the fact that the two charges were almost identical. The respondents have admitted that the two instructions are "substantially the same", Grace v. Butterworth, 635 F.2d 1, 8, n. 2 (1st Cir. 1980), never have argued any lack of identity, and the court below ruled that the two instructions are "substantially identical." Grace v. Butterworth, supra, at 4. In order that the Court may assure itself that that is so, however, the relevant portions of the two charges are set out, word for word, phrase by phrase, in the separate Appendix hereto on pages 87-94.

denied by the trial judge and the denial affirmed by the Massachusetts Supreme Judicial Court because of supposed differences in the two cases (App. 37-41)[5] A petition for habeas corpus relief was then filed in the United States District Court for the District of Massachusetts, the petition dismissed, and on February 5, 1980, the dismissal affirmed on appeal without reaching "the merits of the [state] court's attempts to distinguish the two cases" because the state court had in part relied on the "procedural default" that no exception was taken at trial, years before Ferreira, to the reasonable doubt portion of the charge, there was therefore "a waiver", and that was "sufficient to dispose of the issue", because, even though Ferreira had not excepted either, Massachusetts had complete discretion over the retroactive application of its newly established Ferreira rule, and, alternatively, that the charge was not constitutionally inadequate. (App. 20-36).

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[5] A Petition For Rehearing was filed (App. 58-62) in which petitioners pointed out to the court that its proffered distinctions between this case and Ferreira were specious and arbitrary and the court itself was therefore creating needless constitutional error, but the Petition was summarily denied without opinion.

A few weeks before that opinion of the court below, however, the Massachusetts Supreme Judicial Court had handed down an opinion in the case of Commonwealth v. Garcia, ___Mass.___, 399 N.E. 2d 460 (1980), (set out in relevant parts at App. 78-86) in which, again, the same trial judge's charge defining reasonable doubt in terms of specific examples in jurors' private lives was in issue, but this time the court specifically held "that the charge...,like that in Ferreira, supra, is a constitutionally inadequate definition of 'beyond a reasonable doubt'...[and] that In re Winship, 397 U.S. 358 (1970), made retroactive by Ivan v. New York, 407 U.S. 203 (1972), mandates retroactive application of Ferreira." (emphasis supplied), even though Garcia had also not raised the errors at trial. Petitioners filed a petition for rehearing with the court below forthwith, pointing out that Garcia wholly eliminated the state procedure decisional underpinning of its opinion in holding Ferreira retroactive, and also was in conflict with the court's alternative holding, in that the "definition of" "beyond a reasonable doubt" was now specifically held to be "constitutionally inadequate." The petition for rehearing was promptly

granted, but "limited" "to the [single] question whether, in light of the decision in Commonwealth v. Garcia, the Massachusetts Supreme Judicial Court's failure to apply its decision in Commonwealth v. Ferreira retroactively and grant petitioners a new trial was arbitrary and capricious." [6]

Actually, after its holdings on unconstitutionality and the retroactivity of Ferreira, the state court ruled there was "overwhelming evidence of [Garcia's] guilt", therefore "harmless error", so his conviction was affirmed (App. 78-86), but that question is

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[6]The questions of the two courts' conflicting holdings on the fundamental unconstitutionality of the definition of "beyond a reasonable doubt" was not open upon rehearing, was not briefed or argued by the parties, and neither of the subsequent opinions of the Court of Appeals (App. 1-19) mentioned the issue. The court's initial alternative holdings in its first February 5, 1980, opinion that the definition passes constitutional muster is, therefore, unchanged, is in direct conflict with the Massachusetts Supreme Judicial Court, and is a duly presented question herein: that even if neither Ferreira nor Garcia existed, and there was no problem of reconciling them with Grace, is this jury instruction violative of due process in and of itself.

not involved here in any way. The Court is assured that "harmless error" does not lurk in the record to perhaps avoid reaching the stark constitutional questions presented or even to diffuse their fine focus.[7] After rebriefing and reargument, the Court of Appeals, while recognizing that "[t]he foundation for [its initial opinion] was severely eroded if not totally undermined by" the subsequent Garcia opinion (App. 5-19) did not then even reach the due process issue, but, in an unprecedented procedure, "resubmitted" the case to the state court,

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[7] That argument was never assayed by the respondents in any brief or argument in any court, and when the Massachusetts Supreme Judicial Court first affirmed petitioners' convictions on direct appeal in 1976, it prefaced its summary of the evidence by saying, "The evidence introduced by the Commonwealth and the defendants was highly contradictory." Two sentences further, after noting that the identity of the victim and the place and time of his dying were uncontradicted, the court conceded: *"...[T]he remainder of the evidence was sharply disputed, the Commonwealth's witnesses contending that the defendant[s were] present and shot the victim, and the defendant[s'] witnesses corroborating the defendant[s']...own testimony that [they were] elsewhere at the time of the shooting."* *See* Commonwealth *v.* Frank Grace, *370 Mass. 746, 747-748, 352 N.E. 2d 175, 176-177 (1976).*

specifically retaining jursidiction, however, as a matter of "comity", in order that the state court "in the first instance" could attempt to "reconcile" its refusal of relief to these petitioners with its other decisions (App. 5-19).[8] In the interim, between its Garcia opinion and these petitioners' asking for reconsideration per the Court of Appeals' order, the Supreme Judicial Court happened to hand down two other opinions on alleged errors in defining reasonable doubt, one of which particularly seemed only to compound the confusion, signal a retreat from the Garcia constitutional error holding, and assay a distinction between this case and Garcia. It was brought to the attention of the court below with the inquiry whether it did not sufficiently demonstrate the reconciliation the state court would attempt in this case to make unnecessary the ordered reconsideration. Petitioners were ordered to persevere before the state court.

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[8] Petitioners do not contend that the Court of Appeals did not have the inherent power to resubmit the case to the state court so that it could address the due process issue "in the first instance."

Characterizing that unique referral as a "rehearing" the state court then again denied the petitioners a new trial, now distinguishing their case because the jury instruction had "emphasized 'moral certainty' " and they had waived the constitutional error by not raising the "defect in the charge on reasonable doubt" at trial after it "had been disclosed in an opinion...published before the charge was given", so the due process issue was "not fairly presented" (App. 42-57). Petitioners, as they had been directed ("to keep the court advised"), immediately brought the state court opinion to the attention of the Court of Appeals, pointing out that the two words "moral certainty" were mentioned in passing only twice (only once, actually, with reference to the definition of "beyond a reasonable doubt"), not "emphasized", and were not a sufficient prophylactic to constitutional error anyway, and that the "waiver" distinction was specious because the error in denying "beyond a reasonable doubt" was not only not "disclosed" in the earlier cited case, but the definition had been <u>approved</u>, and that counsel for Ferreira and Garcia had also not thereafter raised the error at

trial but they had not been foreclosed from arguing the issue by any rule of "waiver", because, as the court had said in Garcia: "...we do not require that defense counsel foresee developments in the case law" (App. 78-86), and the rule of Ferreira was new law in Massachusetts, so the state court was anew "arbitrary and capricious" in requiring that only petitioners' counsel be somehow prescient. In a brief three paragraph Per Curiam opinion the lower court then "adhere[d]" to its original affirmance of the denial of the petition for habeas corpus, because "as explained" by the state court its "disposition" did "not...even approach" the constitutional dimension of Fourteenth Amendment error. No explication was proffered.

This petition for the issuance of a writ of certiorari is now timely and duly filed.

REASONS FOR GRANTING THE WRIT

The Court of Appeals holding here that "the jury charge as a whole...[was] essentially sound" and did not "amount to a denial of due process" is in direct conflict with holdings of the Massachusetts Supreme Judicial Court, clear dicta in

three opinions of the District of Columbia Circuit, a square holding of a District Court, and with the spirit, thrust and purpose of recent opinions of this Court. Such conflicts, traditionally, are sufficient reason to evoke this Court's clarifying interdiction, but this case has another even more catholic and compelling dimension warranting the Court's increasingly seiged attention. It is a clean and attractive vehicle to inject some understandable reality into the often semantic quagmire of the "constitutional jury instruction" rubric. The two errors in this charge, which petitioners maintain, at least in tandum, are of constitutional dimension, can be easily described and denominated and excised with surgical precision from the cherished essence of Due Process--evermore a clear and useful guide for every trial judge. Admittedly, the cleanly drawable lines this case permits have a narrow focus, would mark no fundamental changes, but they would assist clarity, be real, and be fair. Lastly (sadly, always lastly, in the rarified special advocacy these petitions demand) were the Court to grant certiorari and eventually hold due process was not

here done, the resulting new trial would be proof that justice can be done, and two young men maybe not imprisoned for life.

Here the trial judge defined proof beyond a reasonable doubt almost entirely in terms of the surety the jurors would have had in "important economic or social decisions" in their "own personal lives", such as "[w]hether to quit school or get a job, or to go on with your education or whether to get married or stay single, or whether to stay married or get divorced, whether to buy a house or continue to rent, or whether to pick up and move to another location and leave your friends for the offer of a better job." (App. 87-94). These homely examples were essentially the entire charge on the standard of reasonable doubt, undiluted by some of the other traditionally utilized equivalent concepts (App. 87-94), and it is the use of these examples as the essential explanation of the burden of proof that petitioners maintain was here a denial of due process. People decide whether "to get a job", "to buy a house", to "move", "or get divorced" oftentimes on no rational basis, but, at best, the decision is made by balancing

the pros and cons. That does not comport at all with the very special and far more rigorous standard of "proof beyond a reasonable doubt"--that is a preponderance of the evidence test, and that is error of constitutional dimension, contrary to the holding of the court below.

The Court has made it ineluctably clear that proof beyond a reasonable doubt is a constitutional command[9], and, ironically, perhaps the most specific recognition that the use of these very same examples, even by the very same judge, denies due process are two opinions by the Massachusetts Supreme Judicial Court. The first was the case that prompted these petitioners to seek a new trial, particularly when the jury charge in issue was almost word for word the same as theirs' (App. 63-77), and a new trial was ordered, even though the error was not couched specifically in

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[9]The Court held in In re Winship, 397 U.S. 358 (1970), on page 364: *"Lest there remain any doubt about the constitutional stature of the reasonable doubt standard, we explicitly hold that the Due Process clause protects the accused against conviction except upon proof beyond a reasonable doubt...."*

constitutional terms.[10] The second case, however, handed down only a month after the First Circuit had held this very charge was not "a denial of due process",[11] specifically held that the use of these same specific examples in the same charge

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[10] In Commonwealth v. Ferreira, 373 Mass. 116, 364 N.E. 2 1264 (1977), the court said (App. 20-36). *"We think these examples understated and tended to trivialize the awesome duty of the jury to determine whether defendant's guilt was proved beyond a reasonable doubt...."*

"...We think the examples used here, far from emphasizing the seriousness of the decision before them, detracted both from the sericusness of the decision and the Commonwealth's burden of proof."

"Accordingly, we conclude that the judgment must be reversed. We think that there was reversible error both in the portion of the judge's charge dealing with sentencing and parole consequences and in his charge on the reasonable doubt standard....The degree of certainty required to convict is unique to the criminal law. We do not think that people customarily make private decisions according to this standard nor may it even be possible to do so...."

[11] The court below held that even though *"this use of the type of analogies invoked by the trial judge to help explain the reasonable doubt standard may in fact understate the degree of certainty required for a criminal conviction,...the ordinary life analogies...[did not have] a significantly... detrimental impact on appellants' rights...[or] on the trial to amount to a denial of due process."* Grace v. Butterworth, supra (App. 20-36).

by the same judge was error of constitutional dimension.[12] The only supporting authority cited was Bumpus v. Gunther, 452 F.Supp. 1060, 1061 (Mass. 1978). In that case, the trial judge had used only one example of "the major affairs of your life", whether or not to have heart surgery, and that was used to define "'moral certainty' theretofore used in defining proof beyond a reasonable doubt", and used some other explanations the court deemed erroneous, yet the court had little difficulty in holding that "the errors in explaining the prosecutor's burden

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[12]The court in Commonwealth v. Garcia, supra (App. 78-86), made two decisive holdings which impact on this case: *"...We hold that the charge in this case, like that in Ferreira, supra, is a constitutionally inadequate definition of 'beyond a reasonable doubt.' The use of specific examples 'trivializes' the standard of proof in the direction of the 'preponderance of evidence' standard. Cf. Bumpus v. Gunther, 452 F.Supp. 1060, 1061 (D.Mass. 1978). Although we find constitutional error in this charge, we must also consider whether this holding applies to the present defendant, whose trial took place some seven years before our decision in Ferreira, supra. We believe that In re Winship, 397 U.S. 368 (1970) made retroactive by Ivan v. New York, 407 U.S. 203 (1972), mandates retroactive application of Ferreira."*

of proof were of constitutional dimension...."[13] The court below did not mention this Bumpus v. Gunther case in holding in this case that the use of the examples did not have "a sufficiently devastating impact on the trial to amount to a denial of due process", but there is no doubt, at least now, that the First Circuit has considered well this

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[13]The court explained, citing In re Winship, supra, and other decisions of this Court, on pages 1062-1063:

"...Moreover, under the hypotheses stated to the jury, a decision 'either to have the operation or not to have it' could not be free from reasonable doubt since death might reasonably follow either course. Principally the analogy is inherently and necessarily confusing: to decide upon a future course of action, whether to have an operation, change a job, get a divorce, etc., is essentially different from accepting or rejecting the truth of a factual proposition such as a criminal indictment...."

"...."

"...Medical diagnosis is a form of opinion which seldom rests upon proof beyond a reasonable doubt. It is almost always based upon a preponderance of the evidence. A verdict in a criminal case is not an opinion or diagnosis comparable to a medical diagnosis....A much higher degree of certainty must exist in the minds of jurors before reaching a guilty verdict in a criminal case...."

patently conflicting holding, only to reaffirm its holding in this case. Eventually the District Court in Bumpus v. Gunther, supra, held that the erroneous instruction, "while of constitutional dimension [was] harmless beyond a reasonable doubt" because the evidence of guilt was "overwhelming" (not an issue here, as noted above) and, overall, the error did not significantly effect the entire trial, and the dismissal of the habeas corpus petition was recently affirmed, but on a slightly different "mode of analysis." Bumpus v. Gunther, ___F.2d___, No. 80-1114, (1st. Cir. Dec. 3, 1980). As to the heart surgery analysis, the court cited its opinion in this case ("...recently we refused to classify such a comparison as constitutional error..."), noted that "the ordinary-life analogies accepted in Grace were less momentous than the heart operation described here", and concluded that it did not "undermine the government's burden, elsewhere reiterated, to establish guilt beyond a reasonable doubt" (Slip opinion, at 10).

Both the opinion below and the District Court opinion holding the use of examples was constitutional error cited Scurry v.

United States, 347 F.2d 468 (D.C. Cir. 1965), cert. denied, 389 U.S. 883 (1967). The instruction there in issue had only referred generally to "the more important affairs of your own life", without the use of specific examples, in defining in part proof "beyond a reasonable doubt." No objection had been taken at trial to the instruction, so the court affirmed the conviction, but said that the analogy could not be equated with beyond a reasonable doubt and to do so was a denial of the defendant's rights,[14] rights this Court was of course later

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[14]The court explained, on page 470:

"...A prudent person called upon to act in an important business or family matter would certainly gravely weigh the often neatly balanced considerations and risks tending in both directions. But, in making and acting on a judgment after so doing, such a person would not necessarily be convinced beyond a reasonable doubt that he had made the right judgment. Human experience, unfortunately, is to the contrary.

"...Thus there is a substantial difference between a juror's verdict of guilt beyond a reasonable doubt and a person making a judgment in a matter of personal importance to him. To equate the two in the juror's mind is to deny the defendant the benefit of reasonable doubt."

to hold were of constitutional dimension. The Scurry court again criticized similar general references to the jurors' important personal decisions in two later cases otherwise inapposite here,[15] and which were not cited by any of the courts below.

It can therefore be seen that the lower court's recent holding that the use of the examples in defining proof beyond a reasonable doubt did not deny the petitioners' rights to due process is in direct conflict with holdings of the Massachusetts Supreme Judicial Court, and the Massachusetts District Court, and dicta of the Court of Appeals for the District of Columbia. This Court should promptly resolve this still very new conflict in such an important area of criminal law[16] before it spawns increasing mischief.

The petitioners also maintain, as noted above, that the jury charge

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[15] United States v. Moore, 435 F.2d 113 (D.C. Cir. 1970), and United States v. Jacobs, 413 F.2d 1105 (D.C. Cir. 1969).

[16] The Massachusetts Supreme Judicial Court, for instance, noted in its Ferreira opinion, on page 128, "that no part of the usual instructions to juries in criminal cases is of more significance than the discussion of reasonable doubt."

contains a second error of constitutional dimension: the trial judge informed the jury of the parole and sentencing consequences of verdicts of first and second degree murder. He had done the same thing in Ferreira, and in ordering the new trial in that case the Supreme Judicial Court discussed at length the long-standing Massachusetts rule that a jury should not be informed of those consequences and concluded that Ferreira had been prejudiced as a result of the judge's ignoring that rule. It is hard to determine from the court's opinion whether that error alone was considered so fundamental that a new trial was mandated, because after expostulating the error and holding that the defendant was prejudiced thereby, the court said, on page 128:

> "We conclude, nonetheless that the defendant is to have a new trial.... Any doubt we may have on this score is resolved by the judge's charge on reasonable doubt."

(The court then went on to detail that second error.)

The authorities relied on by the state court were all opinions of that court, so it at first might seem that this is not error of constitutional dimension, however the court's conceptual basis smacks of due process considerations, and one section of the opinion in particular, in conjunction with a recent decision of this Court, well makes the point that this Court should now see the error as of constitutional import. The state court said, on page 125, of Ferreira quoting from Commonwealth v. Mutina, 366 Mass. 810, 817 (1975):

> "The principal argument for rejecting the practice of instructing juries as to the legal consequences of their verdicts in criminal cases seems to lie in the conviction that, in reaching their verdicts, jurors should be shielded from extraneous influences and should arrive at their verdicts only on a dispassionate consideration of the relevant and credible evidence presented to them in the adversary process.... To inform jurors of the consequences of their verdicts is apprently seen... as inviting result-oriented verdicts and possible devia-

> from the basic issues of a defendant's guilt or innocence. This process, if allowed without restriction, could lead to the jury's usurpation of the judge's sentencing prerogatives and duties and the Legislature's policy determining functions." (Emphasis supplied.)

Although the state court did not then have before it this Court's opinion in Taylor v. Kentucky, 436 U.S. 478 (1978), the conceptual underpinnings of the improprieties of informing the jury of the sentencing and parole consequences in verdicts of first and second degree and even the language used is the same as this Court's opinion. The court noted that the presumption of innocence, as a legal scholar would know, was but a way of describing the prosecutor's duty to prove guilt beyond a reasonable doubt, but that the jury may draw additional guidance from a separate instruction on the presumption. The Court ruled, on page 485 that a criminal defendant "is entitled to have his guilt or innocence determined solely on the evidence introduced at trial, and not on the grounds of official suspicion, indictment, continued

custody or other circumstances not adduced at trial"--what it also termed, on page 488 "extraneous considerations"--exactly the same phrase as the state court utilized in reversing in Ferreira. When the jurors were told about the sentencing and parole consequences of their verdict, this obviously injected "extraneous considerations" into the jury's decision; petitioners were not "judged solely on the basis of proof adduced at trial", and that was constitutional error.

The court below held (App. 20-36) alternatively, that the mention of parole and sentencing consequences was not of sufficient detrimental impact to constitute a denial of due process, and, since the defendants had not argued this error in their initial state appeal, the court agreed with the state court's initial holding that the error had been waived, and that procedural default precluded habeas corpus review even under the rule of Wainwright v. Sykes, 433 U.S. 72 (1977). Under this court's Sykes rule such a procedural default is not waived if petitioners can demonstrate both

"prejudice" resulting from the trial court's rule and "cause" for their failure to argue the issue in their initial appeal. The lower court here apparently accepted the fact that there was sufficient "prejudice" but, noting that this court had not defined either of the crucial terms in Sykes, held that petitioners had not demonstrated such a sufficient cause.

Petitioners maintain in the court below that until the Supreme Judicial Court's opinion in Ferreira, handed down after their initial appeal, informing a jury of the sentencing and parole consequences, had not as yet been held to be reversible error in Massachusetts, the state court's opinion notwithstanding. They maintain that such is the case, and that the Sykes rule should not be held to have waived this error.

The second alleged error in the charge is, petitioners maintain, of constitutional dimension. The charge in Garcia did not contain this error, so the state court has yet to specify that it is error of constitutional dimension but a reference to the court's opinion (App. 63-77) will demonstrate that the

court speaks in essentially constitutional tones. That being so, it is the long-established law in Massachusetts that there is no discretion to deny a new trial when "the original trial was infected with prejudicial constitutional error." Earl v. Commonwealth, 356 Mass. 174, 184 (1960). The most recent restatement of that rule of law, citing Earl , is Commonwealth v. Cook, Mass. Adv. Sh. (1980) 885, 891-892. Such a rule is not special to Massachusetts; it reflects "the long...settled" holdings of this court. See, Sandstrom v. Montana, __U.S. ___ 99 Sup.Ct. Rptr. 2450 (1979), and the cases cited on page 2460.

Even if the erroneous disclosure of the sentencing and parole consequences of the prospective verdict is not sufficient in and of itself to merit the new trial here sought, when considered in conjunction with the constitutionally erroneous instruction on proof beyond a reasonable doubt, the two errors should at least compel the new trial.

After the state court handed down its opinion in Commonwealth v. Garcia, Mass. Adv. Sh. (1980) 21, the First Circuit recognized, upon rehearing, that the state

court's opinion in that case, was, ostensibly, directly contradictory to its opinion affirming the denial of the motion for new trial for petitioners here. It uniquely ordered that petitioners bring that issue before the highest state court, and upon doing so, the Supreme Judicial Court reaffirmed its affirmance of the denial of petitioners' motion for a new trial. This time, however, it recognized that its Garcia opinion had removed two of the three attempts to distinguish this case from Ferreira, and this time endeavored to construct a new distinction. The point that the petitioners had raised upon the Garcia case having been handed down was that the state court was "arbitrary and capricious" in a "knowing refusal to apply precedent with an even hand", as the First Circuit had put it in its second opinion herein (App. 5-19).

The essence of the state court's last opinion herein evolves like this:

1. the standard of review on a collateral attack upon the denial of a motion for new trial based upon an error not previously raised is "to prevent a miscarriage of justice;" (App. 42-57).

2. that standard is "discretionary", involving an assessment of various "factors"; (App. 42-57).

3. that the "main defect in the charge on reasonable doubt [the use of specific examples] had been disclosed in an opinion of [the state court] published before the charge was given", i.e. in Commonwealth v. Bumpus (App. 42-57); and

4. that since there was "no objection or exception" taken to the error at trial and "experienced counsel failed to raise the point in his first motion for a new trial or in his first appeal", that "suggest[s] that it was not thought to be critical", therefore the court would "adhere to [its] prior decision."

The fundamental holding, obviously, is that since Bumpus made it clear that the use of specific examples was reversible error, the petitioners had waived the issue by failing to except or argue it in their first appeal. This was a newly devised effort to distinguish this case from Garcia, and this new theory of "waiver" is not valid--it must be held to be "knowing reversible error to apply precedent with an even hand."

Petitioners will admit that if the state court's opinion in Bumpus had set out what was to be its opinion in Ferreira and Garcia, that the "waiver" rule would foreclose the petitioners, but the lack of "even handedness", the "arbitrary and capricious" rulings of the state court are obvious when its opinion in Bumpus is examined. Bumpus was published in 1972 and petitioners trial was in 1974, but, counting a footnote, only seven sentences in the 12-page opinion are even arguably relevant to the instant issue and they are herein set forth in their entire context, pages 681-682:

> " 10. The defendant assigns as error certain aspects of the judge's instructions to the jury on reasonable doubt. The defendant argues that it was error for the judge to illustrate the meaning of reasonable doubt by comparing the degree of certainty required a juror would want before he decided to undergo major heart surgery. We have previously approved the practice of alluding to important decisions in the personal lives of jurors in an attempt to explain the concept of reasonable doubt.

> See Commonwealth v. Libby, 358 Mass. 617, 621. The inherent difficulty in using such examples is that, while they may assist in explaining the seriousness of the decision before the jury, they may not be illustrative of the degree of certainty required. It may be argued that problems concerning health and medical treatment, such as the illustration used in this case, are sometimes not susceptible to a decision based upon proof beyond a reasonable doubt. [The court's footnote 1. there inserted reads thusly: 'Such illustrations undoubtedly are of assistance to the jury, but the examples must be selected and described with care, for the reasons shown in the above discussion.'] Even assuming the validity of that argument in this instance, the instructions as a whole were comprehensive, were based upon traditional language, and adequately conveyed the concept of reasonable doubt to the jury. See Holland v. United States, 348 U.S. 121, 140."

It is, quite simply, incomprehensible how the Supreme Judicial Court could possibly infer from its opinion in Bumpus the slightest hint that it held or implied that the use of specific examples was reversible error. On the

contrary, any fair reading of Bumpus plainly says that the court approved of the use of specific examples, that they "undoubtedly are of assistance to the jury." Surely, it cannot be said that Bumpus constituted such a clear and definitive ruling of the state court that petitioners trial and appellate counsel should have perceived that the portion of the subject charge constituted reversible error such that their failure to object made out "waiver."

Ferreira made new law on this point in Massachusetts, subsequently, in Garcia, held to be error of constitutional dimension. The Commonwealth has never controverted that contention. All arguments accepted it as a "given" as, impliedly at least, the court below also did in its first two opinions in this case.

This rule of "waiver" was not applied to counsel in Ferreira nor in Garcia--only to counsel for petitioners. In its Garcia opinion, the state court pointed out that no objection or exception was taken to the errors in the charge (as none was taken here), and that it would only review that error and reverse if there were a "substantial likelihood that a miscarriage of justice has occurred", the same standard specified in the state

court's most recent opinion in this case (App. 42-57; 80). The very next sentence in the court's opinion (App. 78-86) reads as follows:

> "...Because we do not require that defense counsel foresee developments in the case law, we shall consider this issue, and review the propriety of the reasonable doubt charge according to the standard stated above ["miscarriage of justice".]"

The court then proceeded to hold that the "constitutionally significant error", "the use of specific examples" made "the charge in this case, like that in Ferreira, supra...a constitutionally inadequate definition of 'beyond a reasonable doubt'." Ferreira is the only case cited--it made new law. Why was not the waiver rule invoked against Garcia and the substantive question of whether a "miscarriage of justice" occurred there determined, but never reached in petitioners' case? The latter opinion arbitrarily never hazards an explanation. Would not the possibility of such a fundamental error as a "miscarriage of justice" be so transcendent that it would mandate overlooking any technical procedural rule of

waiver? That seems to be what the state court did in every other case except the Graces. It would seem that that action can surely be termed "arbitrary and capricious." The holdings in Ferreira and in Garcia are irreconcilable with the state court's opinion in this case, and display a "lack of even-handedness", sufficient that the writ should issue and a new trial be ordered, as is mandated by the Fourteenth Amendment.

C O N C L U S I O N

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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